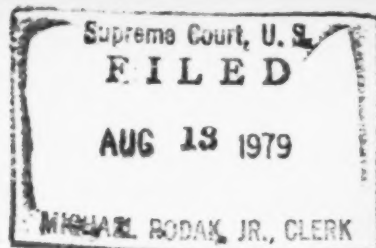


79-233

No.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EUGENE W. WINES, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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2333 N. Central Avenue
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Phoenix, Arizona 85002

Counsel for Petitioner

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

The petitioner, Eugene W. Wines,
defendant below, respectfully prays that
a writ of certiorari issue to review the
judgment and memorandum of the United
States Court of Appeals for the Ninth
Circuit entered in this proceeding on
May 7, 1979.

OPINION BELOW

The memorandum of the court of
appeals (App. A., infra) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1979 (App. A, infra). A timely petition for rehearing with a suggestion for a rehearing en banc was denied on July 16, 1979 (App. B, infra). This petition for certiorari was filed within thirty (30) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a trial court has jurisdiction to reinstate an indictment dismissed under Fed. R. Crim. P. 48(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a capital, or otherwise in-

famous crime, unless on a presentment or indictment of a Grand Jury

26 U.S.C. § 7201 provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Fed. R. Crim. P. 48(a) provides: The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such dismissal

may not be filed during the trial without the consent of the defendant.

STATEMENT

Petitioner was indicted for three counts of income tax evasion, Title 26, U.S.C. § 7201.

During the morning originally set to commence trial, the court heard oral arguments as it related to a defense motion to dismiss the indictment on the grounds that privileged evidence had been presented to the grand jury, the entire grand jury proceeding had not been stenographically recorded as requested by the defense, and the grand jury had possibly been unable initially to agree upon whether to indict and, as such, there may have been off-the-record colloquy between the prosecutor and the grand jurors before a true bill was returned. At the conclusion of defense

counsel's argument, the prosecutor made the following suggestion to the court:

I would like to point out, your Honor, that there is a Grand Jury in session today and should [defense counsel] wish -- all the witnesses for the Government are here -- we will re-present this case if that's what he wants.

The court then asked defense counsel whether he wanted a new indictment. Before a response could be given, the court said, "I don't really care [what defense counsel wants]." At that time, defense counsel argued for the dismissal of the first indictment and contended that it should be dismissed with prejudice. However, the court suggested that a superseding indictment would be the way to skirt ruling on the motion to dismiss, and directed the prosecutor to make a

new presentation.

When the court reconvened that afternoon, petitioner was informed that a superseding indictment had been returned by the grand jury. The court then asked the prosecutor if he wished to move to dismiss the prior indictment, and the prosecutor answered yes. Defense counsel stated that he had no objection if the prosecutor wanted to voluntarily dismiss the first indictment. Thereafter, the first indictment was dismissed under Fed. R. Crim. P. 48(a) upon the Government's motion.

Defense counsel then proceeded to make several motions directed toward the superseding indictment, including a request for the grand jury transcripts on the superseding indictment, a bill of particulars because the superseding indictment figures differed, and finally, a motion to dismiss count one of the new

indictment on the grounds that the statute of limitations had expired.

The court decided not to become enmeshed in the new matters raised by defense counsel and asked the prosecutor if he wanted to withdraw his motion to dismiss the first indictment. The prosecutor then moved to withdraw his motion to dismiss the first indictment, which was granted over the objections of defense counsel. At that time, the trial judge made the following statement:

I'm going to let the Government withdraw their motion to dismiss and we will hold your original hearing. We'll just go through with that and go through with whatever you want to go through with and then we'll go to trial.

The superseding indictment was dismissed by the court at the conclusion of the trial.

Petitioner was found guilty and appealed. The court of appeals reversed and remanded the case for a new trial on another issue but found no error in the trial court reinstating the first indictment and as such, there was jurisdiction over the petitioner.

REASONS FOR GRANTING THE PETITION

1. Under the Fifth Amendment, the power to indict is reposed only in the grand jury. The grand jury, as conceived by the Fifth Amendment, serves as "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." United States v. Dionisio, 410 U.S. 1, 17. A trial judge has no authority, expressed or implied, to remove this constitutional bulwark. As such, an indictment, once validly dismissed, cannot be reinstated by the trial court permitting the Government to

unilaterally withdraw an earlier motion to dismiss that had been granted. Such is not within the jurisdiction of the trial court. Ex parte Bain, 121 U.S. 1, 12.

2. There is a separation of authority between the powers of the judiciary and the grand jury. For example, this Court observed in United States v. Calandra, 414 U.S. 338, 343:

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry.

As such, the trial court has no power to interfere in the indictment process. Similarly, in a recent Ninth Circuit opinion, United States v. Chanen, 549 F.2d

1306 (9th Cir. 1977), cert. denied, 434 U.S. 825, the court, after analyzing the constitutional scheme of powers, appropriately observed that, there is a limited function for the court as well as the prosecutor in their dealings with the grand jury. Id. at 1312. Chanen specifically recognizes that the grand jury was intended to function freely and as a separate, constitutionally established institution. Id. at 1312-13. Accordingly, since indictments are within the sole province of the grand jury, a trial court has no inherent jurisdiction to reinstate an indictment once validly dismissed.

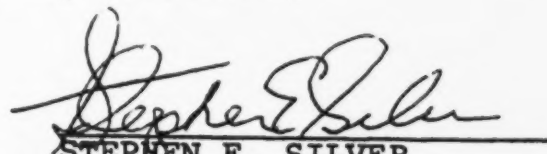
3. The court of appeals, in its memorandum, states that the trial court had inherent authority to reinstate the indictment, citing United States v. Benz, 282 U.S. 304. Reliance upon Benz is

misplaced for that case dealt with the mitigation of a sentence imposed by the trial judge, and not the constitutional protection under the Fifth Amendment afforded a defendant under indictment by a grand jury. The apparent rationale of the court of appeals, that the indictment was reinstated within minutes after its dismissal, disregards the mandatory language of Fed. R. Crim. P. 48(a), which provides that when the motion was granted, the prosecution under that indictment terminated as a matter of law and the trial court had no jurisdiction to reinstate it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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COUNSEL FOR PETITIONER

August 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1979, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

The Solicitor General
Department of Justice
Constitution Avenue
Washington, D. C. 20530

Counsel for Respondent

I further certify that all parties required to be served have been served.



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Counsel for Petitioner

APPENDIX A

MAY 7 1979

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUITEMIL E. MELF, JR. CLERK
U. S. COURT OF APPEALS

United States of America,)
Plaintiff-Appellee,)
v.) No. 78-1551
Eugene W. Wines,) MEMORANDUM
Defendant-Appellant.)

Appeal from the United States District Court
for the District of Arizona

Before: Trask and Wallace, Circuit Judges, and Hoffman,*
District Judge.

Eugene W. Wines was convicted of three counts of violating 26 U.S.C., section 7201, attempted income tax evasion. On appeal he raises numerous issues, only two of which we need consider: (1) Whether the trial judge erred in reinstating the indictment on which Wines was convicted, after it had been dismissed by the government; (2) Whether the government's failure to turn over a tape recording of an interview of a key witness by an IRS agent is reversible error. On the facts of this case, we find no error in the trial judge's reinstatement of the indictment. We reverse and remand for a new trial due to the government's failure to comply with 18 U.S.C., section 3500.⁽¹⁾

*Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

(1) As this case is remanded for a new trial, we need not consider the alleged excess participation by the trial judge in questioning the defendant and witnesses. Reasonable questions always are permissible, but excess participation may bring about error.

-2-

I. Reinstatement of the Indictment

Prior to trial, counsel for the defendant filed a motion to dismiss the indictment on grounds that certain evidence presented to the grand jury was tainted. This motion was argued the day before trial. In response to the defendant's arguments and at the urging of the trial judge to move the case along, the government offered to re-present the case to a new grand jury. This was done without objection by defense counsel and a superceding indictment was returned that day.

Upon return of the second indictment, counsel for the defendant asked that the first indictment be dismissed. The government so moved and the court, without objection from the defendant, dismissed the indictment. Defense counsel immediately raised several objections to the second indictment. The government then moved to withdraw its motion to dismiss the first indictment and stated that it wished to proceed to trial on the first indictment. The trial judge granted the government's motion and reinstated the first indictment.⁽²⁾ The second indictment was dismissed after defendant's conviction on the first.

On appeal, Wines contends that the reinstatement of the first indictment was error and that; therefore, he was tried without a valid indictment. We consider this issue first because if the reinstatement was improper, there is no jurisdiction over the defendant.

The first indictment was dismissed pursuant to

(2) The record indicates that both the trial judge and the Assistant United States Attorney believed that defense counsel had agreed to proceed to trial on the second indictment in the interest of saving time.

1 Rule 48(a), F.R.Cr.P. (3) In order to determine the effect of
 2 the dismissal, we must look to the common-law foundation of
 3 the rule. Rule 48 is based on the nolle prosequi of common
 4 law. The Notes of the Advisory Committee on Rules to
 5 Rule 48(a) state in pertinent part:

6 The common-law rule that the public prosecutor
 7 may enter a nolle prosequi in his discretion,
 8 without any action by the court, prevails in
 9 Federal courts***. This provision will permit
 the filing of a nolle prosequi only by leave
 of court. 18 U.S.C. Rule 48(a) (Citation
 omitted.)

10 The rule does not change the common law in any other
 11 manner. This court previously has stated that a dismissal
 12 under Rule 48(a) "is still only the 'nolle prosequi' of
 13 common law***." Spriggs v. United States, 225 F.2d 865,
 14 867-8 (9th Cir. 1955), cert. den. 350 U.S. 954 (1956).

15 At common law a court could reinstate an indictment
 16 in the same term in which it had been nolle prossed by the
 17 prosecutor. State v. London, 56 S.W.2d 378, 380 (Mo. 1932);
 18 Commonwealth v. McLaughlin, 142 A. 213, 216 (Pa. 1928).
 19 See Annot. 112 A.L.R. 386. See also, Klopper v. North
 20 Carolina, 386 U.S. 213, 220 n.5 (1966) (citing cases and
 21 statutes proscribing reinstatement of an indictment at a
 22 subsequent term of court).

23 In the instant case, the dismissed indictment was
 24 reinstated within minutes after the dismissal. (4) The trial

25 (3) F.R.Cr.P. 48(a) states in pertinent part:

26 The Attorney General or the United States
 27 Attorney may by leave of court file a
 28 dismissal of an indictment, information or
 29 complaint and the prosecution shall there-
 upon terminate.

30 (4) The trial judge dismissed the indictment at page 43 of
 31 the transcript and reinstated it at page 49.

1 court had the inherent authority to do so. In United States
 2 v. Benz, 282 U.S. 304 (1930), a case involving the mitigation
 3 of a sentence by a trial judge, the Court stated:

4 The general rule is that judgments, decrees
 5 and orders are within the control of the
 6 court during the term at which they were
 7 made. They are then deemed to be "in the
 8 breast of the court" making them, and
 9 subject to be amended, modified, or
 10 vacated by the court***. The rule is not
 11 confined to civil cases, but applies to
 12 criminal cases as well***. Id. at 306-7
 (citations omitted).

13 See also, The Palmyra, 25 U.S. (12 Wheat.) 1, 10
 14 (1827) (power of a court to reinstate an appeal dismissed by
 15 mistake); O'Neal v. United States, 272 F.2d 412, 414 (5th
 16 Cir. 1959) (same).

17 We realize that terms of court have been abolished
 18 by statute in the federal system, 28 U.S.C., section 138.
 19 However, where the first indictment is reinstated on the same
 20 day it is dismissed, and probably within thirty minutes, we
 21 believe that the court had the inherent power to take such
 22 action.

23 Defendant has not pointed to any prejudice to his
 24 right to a fair trial as a result of the reinstatement of the
 25 first indictment and a review of the record does not reveal
 26 any. Nor is this a case where the prosecutor has attempted
 27 to harass the defendant by charging, dismissing and re-
 28 charging the defendant without placing him in jeopardy.
 29 Accordingly, we find no error in the trial judge's reinstate-
 30 ment of the indictment.

31 II. Jencks Act Violation

32 At the conclusion of the trial in this case,
 defense counsel moved to impound the government's case file.
 The motion was granted. Defense counsel's review of the
 file revealed a tape recording of a January 21, 1974 inter-
 view with Elaine Jackson conducted by IRS case agent Heck.

Ms. Jackson was the former secretary and bookkeeper of the defendant and a key government witness. At trial, defense counsel had been furnished a memorandum of this interview based on agent Heck's interview notes.

Prior to trial defense counsel had requested any tape recordings that had been made of interviews with prosecution witnesses. The assistant United States attorney advised him that he had already received all such material. Upon further inquiry by the trial judge the assistant United States attorney told the court that defense counsel would be provided with any Jencks Act material which had not yet been given him.

At the conclusion of Elaine Jackson's testimony on direct examination, defense counsel made specific inquiry about any Jencks Act statements made by the witness. The prosecution did not produce the tape recording. Furthermore, defense counsel asked IRS case agent Heck, who was in charge of the Wines investigation and who had conducted and tape-recorded the January 21, 1974 interview of Ms. Jackson, if a tape recording had been made of that interview. The agent testified that he did not believe one had been made.

On appeal the government has admitted that this tape recording, discovered in its file by defense counsel subsequent to the trial, is a Jencks Act statement pursuant to 18 U.S.C. § 3500(c) and that it committed error in failing to produce it at trial. The government has also stated that the memorandum of agent Heck's interview notes, which was given to defense counsel, did not satisfy its obligation under 18 U.S.C. § 3500.

The Jencks Act, 18 U.S.C. § 3500, was drafted by Congress to clarify the scope of the Supreme Court's decision in Jencks v. United States, 353 U.S. 657 (1957). The Act

provides for the production in a criminal trial, for impeachment purposes only, of material and relevant statements of prosecution witnesses which are in the possession of the government. "The Act's major concern is with limiting and regulating defense access to government papers and it is designed to deny such access to those statements which do not satisfy the requirements of [18 U.S.C. § 3500] (e), or do not relate to the subject matter of the witness' testimony." Palermo v. United States, 360 U.S. 343, 354 (1959).

The experiences of the courts with this legislation makes it clear that the limitation and regulation which the Jencks Act seeks to place on defense counsel necessarily places a duty upon the prosecutor. The duty is more than a command not to withhold Jencks Act statements. In order for defense counsel to have access to those statements which can be used for impeachment purpose but be denied access to material extraneous to that purpose, the prosecutor must⁽⁵⁾ conduct a good faith search of the government's files. A prosecutor cannot refuse to perform this duty or fail to direct government agents assigned to the case to conduct a search of their files, and then claim that the prosecution's ignorance of the contents of its files is not culpable. See Giglio v. United States, 405 U.S. 150, 154 (1972); ABA Project on Standards for Criminal Justice, Discovery Procedure before Trial, § 2(d) and comment (e) at 78 (1970).

The Jencks Act gives the United States attorney the following alternatives concerning production of a witness' statements which meet the definitional requirements of

(5) Of course, the prosecutor may, at his election, also turn the entire file over to defense counsel for inspection.

1 18 U.S.C. § 3500(e): (1) presenting the statement to
 2 defense counsel at the close of the witness' direct testimony,
 3 18 U.S.C. § 3500(b); (2) presenting material to the trial
 4 judge for an in camera proceeding to determine if the
 5 material is a Jencks Act statement, 18 U.S.C. § 3500(c); or
 6 (3) not presenting the statement and accepting the sanctions
 7 provided for by the Act, 18 U.S.C. § 3500(d). Subsection (d)
 8 provides for the striking of the witness' testimony or for
 9 the declaration of a mistrial, if necessary, in the interests
 10 of justice.

11 We believe that the government's actions in this
 12 case were an egregious dereliction of its duty under the
 13 Jencks Act and amounted to an election under 18 U.S.C.
 14 § 3500(d) not to produce a Jencks Act statement. The assistant
 15 United States attorney repeatedly assured defense counsel
 16 and the district court that all Jencks Act statements had
 17 been produced. The IRS case agent who made the tape
 18 recording testified that he did not believe there was a tape
 19 recording. Defense counsel's efforts to discover if the tape
 20 recording existed were diligent and specific. This was not
 21 a blanket request for Jencks Act statements. Defense counsel
 22 in this case asked about a specific interview, the
 23 January 21, 1974 interview of Elaine Jackson, and asked
 24 about a specific kind of statement, a tape recording. This
 25 tape recording was in the government's file. There is not
 26 a situation where the tape was lost or in the file of an
 27 agency not connected with this particular prosecution.

28 Despite the gross negligence evident in the
 29 performance of its prosecutorial functions, the government
 30 suggests that we remand this case to the district court for
 31 a determination of whether or not its failure to produce the
 32 tape recording was harmless error. We decline to do so.

1 This case is not one in which the district court
 2 has committed error by failing to impose sanctions required
 3 by 18 U.S.C. § 3500(d). In cases where the district court
 4 has failed to impose the required sanctions we have, on
 5 review, found that such error can be harmless. See, e.g.,
 6 United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976);
 7 United States v. Carrasco, 537 F.2d 372, 377 (9th Cir. 1976).
 8 A district court's failure to strike a witness' testimony
 9 or to declare a mistrial when the government fails to
 10 produce a Jencks Act statement can be harmless error, but it
 11 is, nonetheless, error. The district court in the case
 12 before us did not have the opportunity to impose or fail to
 13 impose the sanctions required by 18 U.S.C. § 3500(d) because
 14 the existence of the tape recording was not made known to
 15 the trial judge at the time of the trial.

16 The failure of the government to produce, at the
 17 time of trial, the tape recording in its file distinguishes
 18 this case from cases such as United States v. Johnson, 521
 19 F.2d 1318 (9th Cir. 1975), and United States v. McSweeney,
 20 507 F.2d 298 (9th Cir. 1974). In McSweeney, certain inter-
 21 view notes which were possibly taken by a government agent
 22 were at issue. We concluded that the explanation upon
 23 which the district court relied in finding that no notes
 24 which constituted a Jencks Act statement existed, was
 25 insufficient. Therefore, we remanded the case for a proper
 26 determination of that issue. In Johnson, we remanded the
 27 case to the district court to determine whether a govern-
 28 ment agent's notes were a Jencks Act statement, a responsi-
 29 bility the district court had failed to perform when the
 30 notes were presented at trial.

31 In both McSweeney and Johnson the government had
 32 proceeded at trial under 18 U.S.C. § 3500(c). It has admitted

at trial that there might be material which constituted Jencks Act statements, but had relied on the district court to act as the arbiter of that issue. In both cases we directed the district court, on remand, to properly exercise its responsibility under subsection (c).

This case, however, arises under 18 U.S.C. § 3500(d) of the Act, because the circumstances under which the government failed to disclose the tape recording at trial amounts to "a wilful avoidance and egregious dereliction of the prosecutor's statutory obligation...." United States v. Polizzi, 500 F.2d 856, 893 (9th Cir. 1974). See, also, United States v. Butler, 569 F.2d 885, 889 (9th Cir. 1978) (non-material evidence suppressed for improper prosecutorial motives warrants reversal as prophylactic measures); United States v. Gerrard, 491 F.2d 1300, 1302 (9th Cir. 1973) (bad faith non-production of material evidence should not be held to be harmless error); United States v. Morrell, 524 F.2d 550, 555 (2d Cir. 1975) (failure to disclose insignificant evidence, if a result of gross negligence on the part of the government, should result in district court ordering a new trial).

In United States v. Well, 572 F.2d 1383 (9th Cir. 1978), we affirmed the district court's order suppressing the testimony of government witnesses because of the government's actions in erasing their tape-recorded interviews with a postal agent. The defense counsel in Well had requested all Jencks Act materials and the existence of the tape recordings was discovered during the government's rebuttal case. In Well we said:

The Jencks Act does not require the defendant to show prejudice. The Act provides that after a government witness testifies at trial the government must produce, on request, any previously made statements by that witness which relate

to the witness's testimony on direct examination. 18 U.S.C. § 3500(b). If the government fails to produce such statements, the court is required to strike the testimony of the witness. 18 U.S.C. § 3500(d).

Id. at 1384.

The existence of the Jencks Act statement in this case was not known at the time of trial and, therefore, the trial judge was unable to strike the witness' testimony. Therefore, for the reasons discussed above, 18 U.S.C. § 3500(d) requires that the judgment be reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

MAY 7 1979

United States v. Wines
No. 78-1551

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

While I agree there was no error in reinstating the indictment, I disagree that the admitted Jencks Act violation necessarily requires a new trial. There was no showing in this record of an election not to produce records and be subject to 18 U.S.C. § 3500(d). The government was grossly negligent, but that does not mean Wines did not receive a fair trial. It is only when the withheld material affected the substantial rights of the party that reversal is required. See United States v. McSweeney, 507 F.2d 298 (9th Cir. 1975). Reversal is necessary when it is impossible to determine whether the error was harmless, United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976); United States v. Well, 572 F.2d 1383 (9th Cir. 1978), but that is not the case here. A memorandum of the Jackson interview was provided to Wines. If we vacated and remanded, the district court could compare it with the tape and determine whether the substantial rights of Wines have been violated. If so, a new trial could be ordered; if not, the conviction could be reinstated. I would vacate and remand for such a hearing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 16 1979

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.) No. 78-1551
EUGENE W. WINES,) O R D E R
Defendant-Appellant.)

Before: TRASK and WALLACE, Circuit Judges, and
HOFFMAN,* District Judge

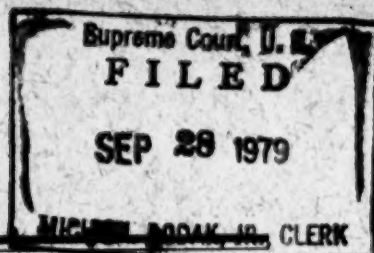
The panel unanimously has voted to deny the petition for rehearing. Judges Trask and Wallace have voted to reject the suggestion for a rehearing en banc. Judge Hoffman recommends against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

No. 79-233



In the Supreme Court of the United States

OCTOBER TERM, 1978

EUGENE W. WINES, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-233

EUGENE W. WINES, PETITIONER

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner seeks review of the district court's reinstatement of an indictment it had previously dismissed in this criminal tax case.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on three counts of criminal tax evasion, in violation of 26 U.S.C. 7201 (R. 1).¹ The court of appeals reversed on the ground that the government had failed to make certain evidence available to petitioner at trial, in accordance with the requirements of 18 U.S.C. 3500 (the "Jencks Act"). Because the court of appeals held that the district court

¹"R." refers to the record filed in the court of appeals. "III-Tr." refers to the third volume of the transcript of the district court proceeding.

correctly reinstated the indictment after it had previously dismissed it at the same session of the court, it ruled that the district court retained jurisdiction over petitioner, and remanded the case for a new trial (Pet. App. 1a-10a). Petitioner seeks review of the ruling below with respect to the reinstatement of the indictment.

The pertinent facts may be summarized as follows: On March 30, 1977, a grand jury returned an indictment charging petitioner with three counts of tax evasion (R. 1). Prior to trial, petitioner moved to dismiss the indictment on the ground that improper evidence had been presented to the grand jury. Petitioner's motion was heard on the first day of trial (see III-Tr. 7-17). After preliminary argument on the motion, the prosecutor stated that there was a grand jury in session and that the case could be presented to that grand jury for a superseding indictment if petitioner so desired (III-Tr. 17-18). The district court then indicated that the prosecutor should seek a superseding indictment, thereby avoiding the necessity of ruling on petitioner's motion to dismiss (III-Tr. 19-21).

Later that day, the grand jury returned a superseding indictment. After reading the superseding indictment, petitioner's counsel asked if it could be assumed that the first indictment had been dismissed (III-Tr. 43). The district court then asked the prosecutor whether the government moved to dismiss the first indictment, and the prosecutor thereupon moved to dismiss the first indictment. In response to a question from the district court, petitioner's counsel stated that he had no objection to the dismissal of the first indictment; the district court thereupon dismissed the first indictment (*ibid.*).

Petitioner immediately moved to dismiss the superseding indictment (which charged the same offenses as the original indictment) on grounds that it was barred by the statute of limitations, that there was an indictment

outstanding against him at the time the superseding indictment was returned, and that the figures alleged in the superseding indictment as the tax liability due and owing were less than the figures alleged in the first indictment (III-Tr. 44-46).

After expressing surprise at petitioner's motion to dismiss the superseding indictment, the prosecutor stated that he would like to proceed on the first indictment and asked the district court to reconsider the dismissal of the first indictment (III-Tr. 47-48). The district court stated that the return of the superseding indictment had been sought in order to save time in resolving petitioner's problems with the first indictment and indicated its belief that petitioner had agreed to the procedure. Faced with an entirely new set of objections to the superseding indictment, the district court granted the government's motion to withdraw the motion to dismiss the first indictment, and proceeded to consider and reject petitioner's objections to the first indictment (III-Tr. 49).

1. Although the court of appeals reversed petitioner's convictions and remanded for a new trial, petitioner seeks review of its holding that the district court correctly reinstated the first indictment. There is, however, no need for this Court to resolve petitioner's claim at this time. If petitioner is acquitted at his new trial, his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by seeking review of the final judgment. See *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-258 (1916).

2. At all events, petitioner's claim is without merit. He contends (Pet. 8-11) that the district court had no jurisdiction or authority to reinstate the first indictment and that its action usurped the authority of the grand jury

to vote indictments. But all of the pertinent precedents support the view that the federal courts have inherent powers to control the litigation before them in these circumstances. Here, the court dismissed the indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, which provides that [t]he Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate." As the court of appeals recognized (Pet. App. 3a), Rule 48 is based on the *nolle prosequi* of common law. See Notes of the Advisory Committee on Rules accompanying Rule 48, 18 U.S.C.A.

The reinstatement of the indictment was therefore within the power of the court. At common law, a court could reinstate an indictment in the same term in which it had been *nolle prossed* by the prosecutor. See *United States v. Rossi*, 39 F. 2d 432, 433 (9th Cir. 1930); *People v. Curtis*, 113 Cal. 68, 69-71, 45 P. 180, 181 (1896); *State v. Lonon*, 331 Mo. 591, 596-597, 56 S.W. 2d 378, 381 (1932); *Commonwealth v. McLaughlin*, 293 Pa. 218, 223, 142 A. 213, 216 (1928). See also 112 A.L.R. 386, 388-389 (1938). Nothing in Rule 48(a) suggests any intent to change this aspect of the common law. Indeed, the court reinstated the indictment in this case minutes after it was dismissed.

Moreover, as this Court has recognized (*United States v. Benz*, 282 U.S. 304, 306-307 (1931)):

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court * * *. The rule is not confined to civil cases, but applies in criminal cases as well * * *.

See also *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 167 (1873); *Goddard v. Ordway*, 101 U.S. 745, 752 (1879). These inherent powers, which have been held to include the power to reinstate any cause dismissed by mistake (see *The Palmyra*, 25 U.S. (12 Wheat.) 1, 9-10 (1827); *O'Neal v. United States*, 272 F. 2d 412, 413-414 (5th Cir. 1959)), also properly include the power to reinstate, on the same day it is dismissed, an indictment *nolle prossed* by the prosecutor prior to trial with leave of the court.

Since petitioner was not prejudiced in any way by the trial court's action, which was a consequence of his own pretrial maneuvering, the decision below correctly upheld the district court's reinstatement of the indictment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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